IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BUELA VIOLA SMITH TRUST c/o MR. DON DAVIS, Plaintiff/Appellant, v. PIMA COUNTY, a body politic and corporate; PIMA COUNTY BOARD OF SUPERVISORS, Defendants/Appellees.	2 CA-CV 2006-0150 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C 20054018

Honorable Charles Harrington, Judge

AFFIRMED

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P E L A N D E R, Chief Judge.

¶1 In this administrative appeal, appellant Buela Viola Smith Trust challenges the superior court's order, entered after a bench trial, affirming a Pima County Board of

Supervisors' (the Board) zoning decision relating to a billboard. The Trust contends insufficient evidence was presented to establish that the billboard was not a legal nonconforming use and Pima County should be estopped from taking action against the billboard. Finding no error, we affirm.

BACKGROUND

¶2 We view the facts in the light most favorable to sustaining the trial court's judgment. *See Koller v. Ariz. Dep't of Transp.*, 195 Ariz. 343, ¶ 16, 988 P.2d 128, 131 (App. 1999). In 2002, John Huntley, "Chief Code Enforcement Inspector" for Pima County, "received a series of complaints" about allegedly illegal billboards in the county. Those complaints triggered an extensive investigation of various billboards, including one situated on West Valencia Road and owned by the Trust. Huntley discovered that the billboard had been originally permitted in 1983 and subsequently had received an "electrical permit" in 1989 that allowed installation of "electrical wiring and lighting on [it]."

¶3 Huntley's investigation included a July 2004 "site visit" to the billboard that revealed substantial structural and electrical changes to it as compared with an aerial photograph of the billboard dated December 1994. According to Huntley, those changes would have "necessitate[d] the application . . . and the issuance of a permit and inspections," and he "was not able to find any permits applied for or obtained for the changes in the structure." Therefore, he testified, a "notice of violation [of the Pima County Uniform Administrative Code] was sent out to the property owners [on] April 8th, 2004."

¶4 That notice stated the Trust should "obtain a permit for th[e] structure and pass all required inspections . . . or remove [the] sign from [the] property." The Trust

apparently failed to comply with those directives, resulting in a citation being issued and a hearing before a Pima County Zoning/Building Codes Enforcement hearing officer. The officer found the Trust "responsible for a violation of Sec[tion] 301 (construction [without] a permit), Sec[tion] 305.4 (failure to comply with a correction notice), and Sec[tion] 308 (connection to utilities) of the Uniform Administrative Code." Thereafter, the Board upheld the officer's judgment.

¶5 Pursuant to the Administrative Review Act, A.R.S. §§ 12-901 through 12-914, the Trust filed a complaint in superior court against the Board and the County seeking judicial review of the Board's final decision. *See* A.R.S. §§ 11-808(G); 12-904(A). Because the initial proceeding before the hearing officer was not recorded, the superior court reviewed the matter de novo. *See* A.R.S. § 12-910(C); *Schmitz v. Ariz. State Bd. Of Dental Exam'rs*, 141 Ariz. 37, 41, 684 P.2d 918, 922 (App. 1984) (upon review of a final administrative decision, a "trial *shall* be de novo if a trial de novo was demanded and the proceedings were not reported so that a transcript might be made"). The trial court denied the parties' cross motions for summary judgment, "finding . . . genuine issues of material fact." Following a bench trial, the trial court affirmed "[t]he Orders and Judgments of the Hearing Officer and the Board of Supervisors." This appeal followed.

DISCUSSION

I. Sufficiency of evidence

¶6 The Trust first contends the trial court's ruling is not supported by sufficient evidence. When the superior court conducts a de novo review of an administrative decision pursuant to § 12-910(C), it "hears the matter 'the same as though it were an original

proceeding upon evidence introduced in [that] court, and with [that] court making an entirely independent determination unfettered by presumptions created by the decision of the administrative agency.'" *Koller*, 195 Ariz. 343, ¶ 16, 988 P.2d at 131, *quoting Herzberg v. State ex rel. Humphrey*, 20 Ariz. App. 428, 431, 513 P.2d 966, 969 (1973) (alterations in *Koller*).

¶7 On appeal from a de novo review pursuant to the Administrative Review Act, "we will sustain the trial court's findings unless they are arbitrary, capricious or an abuse of discretion." *Id.; see also Carondelet Health Serv. v. Ariz. Health Care Cost Containment Sys. Admin.*, 187 Ariz. 467, 469, 930 P.2d 544, 546 (App. 1996). In addition, "the trial court will be deemed to have made every finding necessary to support the judgment." *Marquess v. Spaner*, 15 Ariz. App. 342, 346, 488 P.2d 698, 702 (1971). We review de novo any issues of statutory interpretation. *Webb v. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, ¶ 7, 48 P.3d 505, 507 (App. 2002).

¶8 As noted above, the billboard in question was originally permitted in 1983. In 1985, the County's Zoning Code was amended and the definition of "billboard" was changed, requiring that a billboard's copy be "fastened in a manner to permit its periodic replacement."[1] Former Pima County Zoning Code § 18.79.030(A)(3) (1985). The sign face

[1]The 1965 version of the code in effect when the billboard was originally permitted defined "billboard" as "a free-standing structure or device erected or placed upon the ground or upon a building which structure or device bears a sign, which sign is not necessarily appurtenant to the use of the property on which displayed." Former Pima County Code, § 2301(c) (1965). The new definition required that a billboard be "an off-site sign displaying advertising copy that is pasted, painted or fastened in a manner to *permit its periodic replacement*, and that does not pertain to the sign location." Former Pima County Code § 18.79.030(A)(3) (1985) (emphasis added).

of the billboard in question is permanent and does not allow for changeable copy, but neither side contends that it falls within the current code's definition of billboard. Pima County Zoning Code § 18.79.020(B)(4). Rather, the Trust maintains its billboard is a legal nonconforming use that A.R.S. § 11-830(A)(1) "grandfathers" and protects. In pertinent part, that statute provides: "Nothing contained in any [county zoning] ordinance . . . shall . . . [a]ffect existing uses of property or the right to its continued use or the reasonable repair or alteration thereof for the purpose for which used at the time the ordinance affecting the property takes effect." *See also Rotter v. Coconino*, 169 Ariz. 269, 271, 818 P.2d 704, 706 (1991) (A nonconforming use is "a lawful use maintained after the effective date of a zoning ordinance prohibiting such use in the applicable district.").

¶9 Conceding that a change in use results in the loss of legal nonconforming use status, the Trust argues "[t]he County failed to prove" the billboard "had changed use and thus, was no longer a legal, non-conforming use."[2] *See City of Tucson v. Whiteco Metrocom, Inc.*, 194 Ariz. 390, ¶ 32, 983 P.2d 759, 767 (App. 1999) (a change in use "result[s] in the *loss* of nonconforming use status"). The County contends, however, that even if the Trust is correct that its billboard has been used as an off-site directional sign since

[2]Despite Huntley's testimony that the billboard had been "converted from a changeable copy, double faced billboard to an off-site directional advertising sign for [a local casino]," the Trust maintains "[t]he use here has never changed." It argues "the billboard had been used as an off-site, directional sign, without changeable copy, advertising the Tribe's gaming venues since its creation." The Trust also claims that under the 1965 code, applicable when the billboard was initially permitted in 1983, there was no requirement that a billboard have changeable copy, nor was there any prohibition on a billboard "being a directional sign for any activity or place whether on or off the site where the sign was located." As discussed below, our resolution of this appeal does not hinge on these arguments concerning the billboard's use.

its original permitting in 1983 and 1989, the sign has been dramatically remodeled since then, taking it outside the protection of § 11-830.[3] The record supports the County's contention and the trial court's implicit ruling to that effect.

¶10 As noted above, § 11-830(A)(1) protects "existing uses of property . . . or the reasonable repair or alteration thereof." But repairs or changes not deemed "reasonable" remove the statutory protections and consequently require compliance with existing codes. *See Whiteco*, 194 Ariz. 390, ¶¶ 27, 29, 30, 983 P.2d at 766-67 (replacing "twin I-beam support structure" with "uni-pole structure" was "not a 'reasonable repair'" and, therefore,

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[3]The Trust primarily argues that the essential use of its billboard never has changed. But that is not the issue here. Although this matter proceeded to the Zoning/Building Codes Enforcement hearing officer because of alleged violations of the Pima County Administrative Code, including "construction [without] a permit," the hearing officer, in addition to finding such violations, also issued a "Memorandum" that stated: "it [is] the position of this Hearing Officer that the central issue in this matter does not directly pertain to the specific extent of the improvements/alterations that have been made to the structure in question," but rather, "that the paramount issue in the case pertains wholly to the matter of change of use." Thus, although "change of use" was not alleged by the County through the zoning inspector, the hearing officer's inclusion of such issue has somewhat complicated this case. On appeal, however, the County does not contend that the billboard in question has changed use; rather, it states the issue has always been: "Is [the Trust] responsible, as cited, for construction without a permit and connection to utilities without a permit in violation of the Pima County Code?" We further note that the Board apparently recognized the impropriety of the hearing officer's memorandum, noting "the Hearing Officer basically stated the citation complaint was not a violation, and he came up with his own ruling which said this was a change in use." The Board then remanded the matter to the hearing officer to determine "whether the value of the improvements made to the sign" would have necessitated a permit. The Board did not uphold the judgment of the hearing officer until he had "found that the construction work undertaken on the structure exceeded the value of five hundred dollars, and was undertaken without the required County permits and approvals." Thus, although the hearing officer found a change of use—which then prompted extensive discussion of change of use at the trial de novo in superior court and continued by the Trust on appeal—from its inception, this administrative action was based on violations of the administrative code for construction without a permit.

billboards "lost their nonconforming status"), *quoting* A.R.S. § 9-462.02(A); *Gannet Outdoor Co. v. City of Mesa*, 159 Ariz. 459, 463-64, 768 P.2d 191, 195-96 (App. 1989) (complete destruction and replacement of nonconforming billboards was not a reasonable alteration within meaning of statute and Board of Adjustment did not err in denying permits for new billboards); *cf. Motel 6 Operating Ltd. P'ship v. City of Flagstaff*, 195 Ariz. 569, ¶ 14, 991 P.2d 272, 275 (App. 1999) (updating "sign faces to reflect current company logos and shopping center tenants" did not "alter the use or structure" of the billboards and thus was reasonable under the statute).[4]

¶11 Huntley testified that the changes to the billboard in question had included "all new electrical components," "installation of metal components to enclose the structure into a sign box[, i]nstallation of raised lettering, installation of . . . neon lighting components and electrical feeds" to the neon lighting components. Those changes could reasonably be viewed as structural changes rather than reasonable repairs or alterations.

¶12 Further, as the County points out, the "structure lost its nonconforming status when it was modified and rewired to the extent that building permits were required." Section 11-808(B), A.R.S., provides, "it shall be unlawful to . . . alter or use any . . . structure within a zoning district . . . without first obtaining a building permit from the [county zoning] inspector," except that "[n]o permit shall be required for repairs or

[4]We note that the above cases discussed "reasonable repairs and alterations" under A.R.S. § 9-462.02(A)—which protects legal noncomforming uses from *municipal* zoning ordinances, as opposed to county ordinances under A.R.S. § 11-830. But, because both statutes protect existing uses and the "reasonable repairs and alterations" thereof, analysis of what constitutes reasonable repairs and alterations is essentially the same under either statute.

improvements of a value not exceeding five hundred dollars." Here, there was testimony that the changes to the billboard would have cost approximately $29,000. Accordingly, such changes would have required a permit. And once a permit is required, a nonconforming sign must come into compliance with current ordinances. *See* Pima County Code § 18.79.060(E) ("A nonconforming sign shall not be altered to the extent of requiring a new building permit without being brought into compliance with all the regulations of this chapter.").[5]

¶13 Still, the Trust maintains "the County never came forward with sufficient evidence to show that new building permits were ever required because of unlawful changes to the billboard." But, neither § 11-808(B) nor the County's Code requires a permit only for "unlawful" changes. Rather, a permit is required for *any* change the value of which exceeds $500. Thus, the County was not required to show that the changes to the sign were unlawful. Instead, the changes were unlawful only because of the Trust's failure to obtain a permit for changes that exceeded the $500 threshold.

¶14 The Trust also argues the "County attempted to show a change of use by citing [it] for violations of the technical building code provisions," but "failed to prove" such violations. It claims that, although the County alleged violations of the Uniform Administrative Code, the County had not yet adopted that code "at the time the alleged violations had occurred."[6] The Trust was cited, inter alia, under section 301 of the Pima

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[5]The Trust does not challenge, nor do we address, the validity of County Code § 18.79.060(E) or its compatibility with A.R.S. § 11-830.

[6]The parties agree that the changes to the billboard were made sometime between 1994 and 2000. The County adopted its current version of the administrative code in 2001. Pima County Ordinance 2001-10.

County Uniform Administration Code for "construction [without] a permit." In addition, the prior "notice of violation" apprised the Trust that there had been changes to the structure "without the required Pima County Building Permit" and instructed the Trust to "obtain a permit" and "pass all required inspections within 30 days or remove [the] sign from [the] property."

¶15 The County concedes the code provisions to which the citation referred were not adopted by the County until 2001, but states "[t]he citations made reference to the code in effect at the time the violations were discovered because," as Inspector Huntley testified, the County "appl[ies] the rules that are in effect at the time the permit application is submitted." As he explained, the notice of violation instructed the Trust to obtain a permit within thirty days of the notice and, therefore, if the Trust had sought a permit within that time, "[t]he permit would [have been] obtained under the current code."

¶16 Further, as the County also points out, "each day that [an] altered structure remains unpermitted is a continuing violation." *See* A.R.S. § 11-808(C) ("Each and every day during which the illegal . . . construction, reconstruction, alteration, maintenance or use continues is a separate offense."). And § 11-808(B) was in effect between 1994 and 2000—the time frame during which changes were made to the billboard—and put the Trust on legal notice that any construction over $500 required a permit. The Trust's failure to obtain a permit resulted in continuous violations.

¶17 In sum, the record adequately supports the trial court's implicit findings that the billboard's structure was altered in a way that took it outside of the protection of A.R.S. § 11-830(A)(1), that changes to the billboard required permits, and that, therefore, the

billboard lost its valid nonconforming use status. Accordingly, we disagree with the Trust that the evidence was insufficient "to establish that [the] billboard was not a legal non-conforming use." Nor can we say the trial court's judgment was "arbitrary, capricious or an abuse of discretion." *Koller*, 195 Ariz. 343, ¶ 16, 988 P.2d at 131.

II. Estoppel

¶18 The Trust also argues "[t]he County is estopped from disallowing a use it has previously allowed and permitted." Preliminarily, the County claims the Trust "never asserted [this issue] at the de novo trial" and, therefore, it is waived on appeal. But the Trust counters that it raised the argument below in two ways: first, in its motion for summary judgment and second, in its pretrial statement.

¶19 In a case such as this, where the trial court denies summary judgment and the case then is tried, "a party who wants to preserve a summary-judgment issue for appeal, with a possible exception for a purely legal issue, must do so by reasserting it in a . . . post-trial motion." *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, ¶ 19, 96 P.3d 530, 537 (App. 2004) (footnote omitted). And, "[a]s a general rule, unless the facts are undisputed or only one reasonable inference can be drawn from them, whether the facts presented adequately establish estoppel is for the . . . trier of fact to decide." 28 Am. Jur. 2d *Estoppel & Waiver*, § 187 (2007) (footnote omitted). But, because the underlying facts relating to the Trust's estoppel theory are essentially undisputed and because the trial court considered the motions for summary judgment and subsequently acted as the trier-of-fact in the trial de novo, we find that the issue was adequately before the trier-of-fact and, thus, not waived.

¶20 We review a trial court's decision not to apply estoppel for an abuse of discretion. *See Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, ¶ 5, 2 P.3d 1276, 1279 (App. 2000); *Pizziconi v. Yarbrough*, 177 Ariz. 422, 427, 868 P.2d 1005, 1010 (App. 1993). We find no such abuse of discretion here.

¶21 "The elements of equitable estoppel are: '(1) the party to be estopped commits acts inconsistent with a position it later adopts; (2) reliance by the other party; and (3) injury to the latter resulting from the former's repudiation of its prior conduct.'" *Whiteco*, 194 Ariz. 390, ¶ 22, 983 P.2d at 765, *quoting Valencia Energy Co. v. Ariz. Dep't of Revenue*, 191 Ariz. 565, ¶ 35, 959 P.2d 1256, 1267-68 (1998). "'Estoppel is not applicable where the one asserting the doctrine is guilty of misconduct toward the person against whom he seeks to have estoppel applied.'" *Whiteco*, 194 Ariz. 390, ¶ 26, 983 P.2d at 766, *quoting United Bank v. Mesa N.O. Nelson Co.*, 121 Ariz. 438, 442, 590 P.2d 1384, 1388 (1979). Here, as in *Whiteco*, "[i]t was [the Trust's] conduct . . . that triggered the termination of the nonconforming use status" by altering the sign "without a permit." *Id.* ¶ 26. "Under these circumstances," where the county "did nothing upon which [the Trust] could rely," "estoppel does not apply." *Id.*

¶22 Similarly, we reject the Trust's minimal argument that laches should bar "Pima County's enforcement action." "Laches involves an unreasonable delay after knowledge of the facts which works a hardship." *Maricopa County v. Cities and Towns of Avondale, et al., Wickenburg*, 12 Ariz. App. 109, 113, 467 P.2d 949, 953 (1970). Citing some out-of-state cases in its reply brief, the Trust argues "[t]he doctrine of laches should apply here," where "[e]ven when the County was aware of the violations they did nothing for years." But

the inspector noted the investigation of billboards began in 2002, and he notified the Trust of its alleged violations in April 2004. That time frame hardly qualifies as an "unreasonable delay." Further, as the County points out, "[f]ar from suffering injury due to any lapse of time since the billboard first became illegal, [the Trust has] received a windfall benefit in the form of sign rental income." Accordingly, neither estoppel nor laches precluded this enforcement action.

DISPOSITION

¶23 The judgment of the trial court is affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge